

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PATSY L. BEAUCHAM**  
Claimant

VS.

**VIA CHRISTI REGIONAL MEDICAL CENTER**  
Self-Insured Respondent

Docket No. 1,021,659

**ORDER**

Respondent requests review of the April 26, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

**ISSUES**

The ALJ concluded the claimant was injured out of and in the course of employment with respondent from July 1, 2004 and each and every working day through December 21, 2004. He further concluded the respondent received the statutorily required notice of her injury. Claimant was awarded medical treatment, payment of “[a]ll medical” and temporary total disability benefits.<sup>1</sup>

The respondent appeals this finding arguing that claimant failed to establish that she sustained a compensable injury to either her neck or back arising out of or in the course of her employment. Respondent also denies claimant gave the required 10 day notice of any injury to either her neck or her back stemming from her work activities. Thus, respondent maintains the ALJ’s preliminary hearing Order should be reversed.

Alternatively, respondent suggests that claimant’s first surgery to her neck is not compensable as claimant certified that condition was not work-related when she applied for FMLA leave in December 2004. Thus, while claimant may have provided notice of her back complaints while off work recuperating from her neck surgery, that condition is wholly

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<sup>1</sup> ALJ Order (Apr. 26, 2005) (emphasis added).

unrelated to the condition which precipitated her FMLA request for time away from work.

Conversely, claimant contends the ALJ's Order should be affirmed. Claimant alleges she injured her neck, right arm and lower back in the course of her employment as a result of her repetitive activities of bending and twisting while checking patient trays. Claimant maintains she informed her supervisor of her difficulties performing work on the tray line in December 2004, just before she had neck surgery, and again in February 2005, as she was scheduled to have low back surgery. While claimant concedes she initially denied her neck complaints were work-related, she was concerned that she would lose her job if she reported her neck complaints. However, when faced with a second round of surgery to her low back, claimant concluded it was necessary to file a claim.

The issues to be addressed are 1) whether claimant sustained an accidental injury arising out of and in the course of her employment with respondent over a period of time culminating on December 21, 2004; and 2) whether respondent had notice of claimant's alleged injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be affirmed.

At the time of her alleged injury, claimant was working for respondent as a dietary assistant. Although a significant portion of her job duties involved only paperwork, claimant was repetitively required to lift, bend, squat and turn while checking the patient food trays. In the summer of 2004, claimant began having problems with her right arm, neck and lower back. She sought treatment and was eventually diagnosed with a herniated disk at C5-6. Claimant was referred to Dr. John Dickerson, who concluded that claimant required a cervical disectomy and fusion.

Claimant reported her intention to have neck surgery to respondent. She completed a request for FMLA leave on December 9, 2004. This document asks the reason for claimant's request for leave. Claimant indicated that she required leave for "my own serious health condition".<sup>2</sup> This same form asks whether the condition is work-related. Claimant marked the box indicating "No".<sup>3</sup> Claimant's condition was certified by Dr. Dickerson. According to claimant, she knew her condition was work-related, but did not want to risk her job. She denied the condition was work-related so she would be assured her job would remain secure despite her absence.

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<sup>2</sup> P.H. Trans., Resp. Ex. 1.

<sup>3</sup> *Id.*

She informed her supervisor, Wanda Reinking, of her right arm, leg, back and neck problems and her need for surgery. Claimant also told Ms. Reinking that it was the tray line that was causing her symptoms. Ms. Reinking took claimant off of the tray line for the nine days before surgery, and admits claimant told her that her back hurt while working the tray line.

Claimant was taken off work on December 21, 2004 and had neck surgery performed by Dr. Dickerson the next day. The discharge summary from the hospital indicates not only the neck diagnosis of herniated disk at C5-6 but also a diagnosis of low back pain with right radiculopathy.

Claimant saw Dr. Dickerson for a follow-up visit on January 10, 2005 and again on February 7, 2005. During the February visit, claimant indicated that she still had pain in her neck and both shoulders and that she still had low back pain and anterior right buttock pain with numbness and tingling in the legs.<sup>4</sup> She told Dr. Dickerson that her leg and back pain dated back to the summer of 2004. He recommended an MRI, which was done, and recommended surgery for her low back.

While it is not included in his office notes, claimant maintains that she and Dr. Dickerson discussed the cause of her problems. She testified that once he learned her condition was work-related in February and that she was going to have yet another surgery, she contacted JoLynn Northrop, the workers compensation coordinator for the medical center. Claimant testified that she told Ms. Northrop that she was having surgery and that her condition was work-related. Claimant wanted to know if workers compensation would cover the back surgery scheduled for mid February 2005. Claimant was told that she needed to see an authorized medical provider, and that it would take time to set that up, so surgery would not be authorized for at least a couple of months.

Ms. Northrop confirms that the two had a conversation on February 10, 2005, which Ms. Northrop memorialized in a memo. While Ms. Northrop adamantly maintains that claimant never specifically told her that her neck and back complaints were related to her work activities, Ms. Northrop confirms that this conversation was the first report she received of a connection between claimant's back complaints and her work activities.<sup>5</sup>

Claimant felt that she could not wait that long and went ahead with the surgery to her low back on February 16, 2005. After her back surgery, claimant again contacted Ms. Northrop and inquired about whether it was too late to file a workers compensation claim. Ms. Northrop indicated that it was.

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<sup>4</sup> *Id.* at 11-12.

<sup>5</sup> *Id.* 28.

When asked about why she delayed in filing her claim, claimant indicated that she was trying to protect her job. At the preliminary hearing, she explained it this way:

When I – can I just start from the beginning with my neck and just say when I had my neck surgery, I didn't turn it in to workman's comp. They told me it could be from my job. I went ahead and just did what I did to protect my job because I don't want to have to come back to work with restrictions knowing I could lose my job. So when the back surgery came up, I knew I was – I knew that I had to try to protect myself and I went to the doctor to tell him: Is it 100 percent, can you tell me is this from my work? And he said yes.<sup>6</sup>

The ALJ concluded claimant sustained her burden of proof and established that she sustained accidental injury arising out of and in the course of her employment with the respondent over a series of dates culminating on December 21, 2004, her last date of work. He also found that claimant provided the statutorily required notice.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>7</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>8</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase in the course of employment relates to the time, place, and circumstances under which the worker's accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>9</sup>

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<sup>6</sup> *Id.* at 25.

<sup>7</sup> K.S.A. 44-501(a).

<sup>8</sup> *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

Here, the claimant testified that her job activities caused her neck and back complaints and her ultimate need for two separate surgical procedures. Certainly, the record is devoid of any medical testimony to that effect. But, given the nature of claimant's work activities and the lack of any credible alternative explanation as to the cause of her ongoing complaints, the Board agrees with the ALJ's conclusion. Thus, the ALJ's conclusion that claimant was injured arising out of and in the course of her employment with respondent is affirmed.

As for notice, the Board also affirms the ALJ's conclusion that proper notice was provided. K.S.A. 44-520 provides:

**Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The obvious purpose of this statute is to allow the employer an opportunity to investigate the worker's claim.

Here, claimant testified she told her supervisor back in December 2004 that her work activities on the tray line were causing her physical complaints. Her supervisor then altered her work duties. Although the ALJ did not specifically reference this act, it is likely that this event was the one that he believed satisfied the criteria set forth in K.S.A. 44-520. Whether it was this attempt at notification or the subsequent conversations with Ms. Northrop in February 2005, either will suffice under the statute. The February 10, 2005 conversation which Ms. Northrop concedes gave her notice of claimant's claim, came within 75 days of claimant's last date of work before surgery. The Board finds claimant demonstrated just cause for her failure to provide notice any sooner, other than her exchange with her supervisor Ms. Reinking. Thus, the ALJ's findings on the issue of notice are affirmed.

The Board notes that claimant was less than candid on her application for FMLA leave and is troubled by her admitted falsehood. However, as she explained, she believed

she could proceed with surgery and wanted to return to work. She wanted her job to remain open for her and saw the FMLA as a means to do that. While the Board does not endorse or condone such behavior, it is understandable.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated April 26, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2005.

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Fred L. Haag, Attorney for Self-Insured Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director